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Supreme Court of the United States

October Term 1975

No. 75-236

MICHAEL KUTLER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

PETITION FOR REHEARING

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The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on November 11, 1975; and (2) granting the petition. As ground for this motion, petitioner states the following, which was available to petitioner but not previously presented:

The Decisions of the Third Circuit Concerning the Reliability of Informant's Tips are in Conflict.

In *United States v. McNally*, 473 F.2d 934 (3rd Cir. 1973), the Third Circuit reviewed the sufficiency of an affidavit for a search warrant based largely on information from an informant. The Court there applied a tripartite

analysis, derived from *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969): (1) Does the affidavit establish that the informant was credible *and* does it contain a recitation of the circumstances underlying the informant's conclusions? *Id.*, 473 F.2d at 937; (2) If not, is the information sufficiently corroborated to show that it was obtained in a reliable way? *Id.*, 473 F.2d at 938; (3) If not, is there other incriminating evidence or "indicia of criminal activity" in the affidavit "'which would permit the suspicions engendered by the informant's report to ripen into a judgment that a crime was probably being committed'"? *Id.*, 473 F.2d at 939 (quoting from *Spinelli, supra*).

In the decision which petitioner here seeks to have reviewed, however, the Third Circuit apparently overlooked its own tripartite analysis.[1] The discussion in the petition for a writ of certiorari established that the affidavit for the search warrant here contained no facts to indicate that the informant was credible, contained only *de minimus* corroboratory information, and contained no incriminating evidence apart from that provided by the informant (see Petition for Writ of Certiorari at 11-17). Hence, the Third Circuit was bound by its own precedent to declare the affidavit constitutionally inadequate. Yet it did not do so.

* * * * * * *

Four Justices[2] of this Court have already voted to grant petitioner's petition for certiorari on a ground other than the Fourth Amendment issue set forth in this Petition for Rehearing – in their opinion, the statutes under which petitioner was prosecuted are unconstitutional. However,

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[1] Since the ruling of the Third Circuit was not accompanied by an opinion, the precise basis for its decision cannot be definitely ascertained.

[2] One of the four Justices, Justice Douglas, has since retired from this Court. The other three Justices were Justices Brennan, Stewart and Marshall.

because these four Justices did not insist that the case be heard on the merits, the petition was denied. *Compare Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 560 (1957) (Harlan, J. concurring); *Harris v. Pennsylvania Railroad Co.*, 361 U.S. 15, 18 (1959) (Douglas, J., concurring).

Furthermore, while voting to grant certiorari because of the unconstitutionality of the statutes, these four Justices did not consider whether certiorari should be granted because of the numerous other issues of critical importance to the trial of obscenity cases in federal courts which the petition presented. These additional issues included whether a defendant in an obscenity prosecution has a right to introduce survey evidence of community attitudes toward explicit sexual material (Question VI), whether probable cause must be established to a higher degree where the seizure of materials presumptively protected by the First Amendment is sought than otherwise (Question II), and whether the standard of offensiveness of a film must be judged in relation to the film's intended and probable recipient group (Question VII).

CONCLUSION

The conflict in the decisions of the Third Circuit has engendered uncertainty in a fundamental area of Fourth Amendment law. In view of this uncertainty, and the other important issues presented by the petition for certiorari, petitioner urges this Court to vacate its denial of his petition for certiorari, and to grant the petition.

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

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